(5)

No. 95-1608

In The

Supreme Court of the United States

October Term, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and JOAN ANDERSON GROWE, Secretary of the State of Minnesota,

Petitioners,

vs.

TWIN CITIES AREA NEW PARTY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE PETITIONERS

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

PETER M. ACKERBERG
Assistant Attorney General
1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
(612) 282-5712

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Do a political party's associational rights under the First and Fourteenth Amendments require a state to permit multiple-party candidacies on its election ballot?

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JURISDICTION

The court of appeals entered its judgment on January 5, 1996. The petition for a writ of certiorari was filed on April 4, 1996, and was granted on May 28, 1996. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1 provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 204B.04, subd. 2 (1994) provides:

> No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.12, subdivision 4.

Minn. Stat. § 204B.06, subd. 1(b) (1994) provides:

> An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:
>
> . . .
>
> (b) Has no other affidavit on file as a candidate for any office at the same primary or next ensuing general election. . . .

STATEMENT OF THE CASE

Respondent Twin Cities Area New Party ("New Party"), a minor political party under Minnesota law, sued petitioners[1] ("State") in August, 1994, in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 27.

In Minnesota, minor-party candidates are nominated by petition, unlike major-party candidates who are nominated by primary election. Minn. Stat. § 204B.03 (1994). The petition for a minor-party candidate for a state legislative seat must be signed by at least 500 eligible voters or ten percent of the total number of voters in the legislative district at the last preceding state or county general election, whichever is less. Minn. Stat. § 204B.08, subd. 3(c) (1994). Candidates of four minor parties appeared on the 1994 Minnesota general election ballot, including one – the Independence (now Reform) Party – which achieved major-party status as a result of the election. Affidavit of Peter M. Ackerberg, Eighth Cir. Docket Sheet No. 11 (number of minor parties); Election Division, Secretary of State, *The Minnesota Legislative Manual: 1995-96*, at pp.

[1] Petitioners McKenna and Growe are county and State election officials, respectively. Pet. App. 27-28.

368-89 (1995) (showing Independence Party candidate for U.S. Senate received required vote distribution and percentage for major party status pursuant to Minn. Stat. § 200.02, subd. 7(a) (1994)).

The New Party sought to nominate incumbent State Rep. Andy Dawkins in 1994 as its candidate for a seat in the Minnesota House of Representatives. Pet. App. 28. Rep. Dawkins was also an unopposed legislative candidate for the same House seat in the primary election of the Minnesota Democratic-Farmer-Labor Party ("DFL"), one of the State's major parties. *Id.* at 27-28. He was thus assured of being the DFL nominee. *Id.* at 2.

The two provisions of Minnesota law at issue here prohibit candidates for election from appearing on the general election ballot more than once. Minn. Stat. § 204B.04, subd. 2 (1994) provides:

> No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition, except as otherwise provided for partisan offices in section 204D.10, subdivision 2, and for nonpartisan offices in section 204B.12, subdivision 4.

In addition, Minn. Stat. § 204B.06, subd. 1(b) (1994), requires that an affidavit of candidacy must state, *inter alia*, that the candidate "[h]as no other affidavit on file as a candidate for any office at the same primary or next ensuing general election. . . . "[2] Accordingly, election officials rejected the New Party's attempt to place Rep. Dawkins on the general-election ballot as the New Party nominee because he had previously filed as a candidate for the DFL nomination. Pet. App. 2.

[2] Minnesota has prohibited multiple-party candidacies since 1901. *See* Act of April 13, 1901, ch. 312, 1902 Minn. Laws 524.

Minnesota is not alone in its electoral policy of prohibiting multiple-party candidacies on the ballot. Multiple-party nominations, also known as cross-filing, cross-nomination or fusion, is prohibited by most states in some manner. A compilation of relevant state statutes is provided as Appendix A to this brief.[3]

Seven states permit some form of ballot fusion. See Appendix A.[4] New York is apparently the only state where cross-nomination continues to be a significant electoral factor. *Cf.* L. Sandy Maisel and Charles Bassett (eds.), "Cross-Endorsement Rule," 1 *Political Parties & Elections in the United States: An Encyclopedia* 218 (1991) (citing reasons why fusion not widely used where permitted in Vermont and Connecticut). See also pp. 21-22, *infra*.

In August, 1994, the New Party filed this action challenging, as applied, the constitutionality of the ballot fusion statutes as violations of the party's rights to associate protected under the First and Fourteenth Amendments. The party moved for a preliminary injunction, seeking to have the district court enjoin the defendants from refusing to place the name of Rep. Andy Dawkins on the November, 1994, general election ballot as the candidate of the New Party. The State opposed the motion and asked the district court to grant summary judgment for it. Pursuant to agreement of the parties and order of the district court, the motion for preliminary

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[3] Appendix A is based on information contained in Note, *Fusion Candidacies, Disaggregation, And Freedom Of Association*, 109 Harv. L. Rev. 1302, 1303-04, n.14 (1996) (compiling statutes) (hereinafter "*Fusion Candidacies*").

[4] The law review compilation concludes that New York, Oregon, Vermont and Utah "appear on the face of their statutes to allow fusion" and that "Arkansas, Connecticut and Idaho neither expressly provide for fusion candidacies nor expressly ban them." *Fusion Candidacies*, 109 Harv. L. Rev. at 1303-04, n.14.

relief was consolidated with the motion for summary judgment.

In support of its challenge, the New Party offered a written declaration of Walter Dean Burnham, a professional political scientist. Declaration, para. 1; Joint Appendix ("J.A.") 11. He stated, among other things, that extensive regulation of political parties, which effectively began in the 1890s, was often crafted to limit the role of parties, especially third parties. *Id.*, para. 8; J.A. 13-14. Most state legislatures enacted one measure or another that outlawed multiple-party nominations, Mr. Burnham asserted. *Id.*, para. 10; J.A. 15. In addition, he stated his view that in New York, where multiple-party candidacies are allowed, the practice "has permitted electoral competition from both the left and the right of the mainstream parties, and greater representation of such minority views in the selection of mainstream candidates." *Id.*, para. 11, J.A. 15.

The district court granted the State's summary judgment motion, relying in part on *Swamp v. Kennedy*, 950 F.2d 383 (upholding Wisconsin ban on cross-filing), *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992). Pet. App. 21-22, 25. The court first rejected the State's argument that resolution of the case is governed by *Storer v. Brown*, 415 U.S. 724 (1974). Pet. App. 18-19. The district court characterized *Storer* as a challenge to a "sore loser" statute designed to prevent intra-party squabbles from being waged by self-described "independents" in the general election. *Id.* at 19. In contrast, as the district court noted, Rep. Dawkins was not a sore loser but rather a "willing participant" in an effort to be nominated by both the DFL and the New Party. *Id.*

Instead of relying on *Storer*, the district court reviewed the State's fusion ban under the legal analysis set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Pet. App. 17, 19-24. First, in considering the "character and magnitude" of the restriction, the district court concluded that prohibiting cross-filing is not a "severe" restriction but a "minimal burden" on the New Party's First Amendment rights. *Id.* at 23. The district court noted that the cross-filing ban does not prevent the New Party from nominating a candidate. *Id.* at 20. Instead, the ban merely prevents New Party followers from "hitching their political cart to another party's star." *Id.*

The court then addressed the second part of the *Anderson* test by identifying and evaluating the precise State interests advanced for the restriction. *Id.* at 21-22. It found the State's interest in avoiding voter confusion and seating candidates who win at least a plurality of votes as a party's nominee to be compelling. *Id.* at 22. The court reasoned that the appearance of a candidate's name more than once under different party labels would result in voter confusion, if not create the appearance of unfairness. *Id.*

Weighing the minimal burden imposed by the cross-filing ban on the New Party's First Amendment rights against the interests advanced by the State for the ban, the court concluded that the cross-filing ban "is a valid and non[-]discriminatory regulation of the electoral process." *Id.* at 23. The court also stated that the cross-filing ban would be upheld even under the "stricter scrutiny" required of election statutes that, unlike those at issue, exclude a party or candidate from the ballot. *Id.* at 24. Finally, the court added that the mechanics of choosing candidates and counting votes is best left to legislative determination. *Id.* at 24-25.

The Court of Appeals for the Eighth Circuit reversed the district court. It held that the ballot fusion ban imposes a "severe" burden on the New Party's associational rights because "[t]he New Party cannot nominate

its chosen candidate when the candidate has been nominated by another party," *id.* at 5, and "because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." *Id.* at 6. The cross-filing ban was characterized as hindering the New Party's effort to establish itself as a "durable, influential player in the political arena" by forcing it "to make a no-win choice." *Id.* The court remarked that in the absence of cross-filing, "New Party members must either cast their votes for candidates with no realistic chance of winning, defect from their party and vote for a major party candidate who does, or decline to vote at all." *Id.*

In ruling that the State's ban on cross-filing "is broader than necessary to serve the State's interests . . . ," *id.*, the court of appeals reasoned that major party splintering is curable by requiring the major party's consent for multiple nominations, and voter confusion can be remedied by simple ballot instructions. *Id.* at 7-8. The remaining State concerns – the potential problem of overcrowded ballots and uncertainty about how to determine the winning candidate – were dismissed as "simply unjustified." *Id.* at 9. The court of appeals stated that the State's concern about ballot overcrowding is sufficiently satisfied by statutory requirements for a candidate to demonstrate minimal support before being placed on the ballot. *Id.* The court added that the State's concern with counting ballots to determine the winning candidate is not advanced by banning multiple-party nominations. *Id.* The court of appeals found nothing remarkable about aggregating votes cast for a candidate appearing on the ballot as the nominee of more than one political party. *Id.*

The court acknowledged that its decision conflicts with *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991)

(upholding Wisconsin cross-filing ban), *cert. denied*, 505 U.S. 1204 (1992); Pet. App. 10. It noted that the *Swamp* court did not decide whether Wisconsin's law could have been more narrowly tailored. *Id.* The Eighth Circuit concluded that Minn. Stat. §§ 204B.04, subd. 2 and 204B.06, subd. 1(b), are unconstitutional as violations of the New Party's associational rights. *Id.*[5]

The State filed a petition for a writ of certiorari seeking review of the Eighth Circuit's ruling striking down its statutes. The Court granted the petition.

SUMMARY OF ARGUMENT

This case tests the extent to which states must frame their election laws, and their election ballots in particular, to maximize opportunities for minor political parties to have a significant impact. Minnesota, like all but a handful of states, does not allow a candidate for elective office to appear on the ballot as the candidate of more than one party. In this case, the State's ban on multiple-party candidacies prevented the Respondent New Party from having a line on the general election ballot as an additional party sponsor of Rep. Andy Dawkins, a Democratic-Farmer-Labor legislator, who was already on the ballot as the DFL candidate. The New Party asserts, and the Eighth Circuit agreed, that the State's ban on multiple-party candidacies violates the party's First and Fourteenth Amendment rights to political association.

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[5] The Minnesota Legislature enacted a statute permitting some minor parties to cross-nominate in response to the Eighth Circuit decision. Act of April 2, 1996, ch. 419, 1996 Minn. Laws 979, *reprinted in* Appendix B to this brief. The Act expires and the prior fusion ban is revived if the decision below is reversed. *Id.* at § 10, 1996 Minn. Laws 982; App. B at B-5.

The Court applies a balancing test to challenges to state regulations in the election arena that first carefully evaluates the actual impact of the regulation on protected First Amendment activity. It is important to recognize that the First Amendment protects the associational interests of political parties, not because of any inherent First Amendment value in political parties per se, but only to the extent that parties serve core First Amendment values. The right to associate for the advancement of shared values is central to the First Amendment's protection of political parties. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Another core First Amendment value is fostering diversity in the marketplace of ideas. This value is reflected in the Court's ballot access cases that emphasize the importance of minor parties as vehicles for enhancing that diversity by providing alternative candidates. *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

The ban on ballot fusion does not impair the party's associational rights in any way that affects these core First Amendment values. New Party members can associate freely for the advancement of their shared goals, whether it be in support of Rep. Dawkins or any other candidate they choose as best representing their political philosophy. They can work for that candidate and ultimately vote for that candidate, because the challenged law keeps no candidate off the ballot. Furthermore, by encouraging minor parties to put new and different candidates on the ballot, the ballot fusion ban fosters diversity of political debate and enhances that core First Amendment value.

The circuit court did not focus on the impact of the ballot fusion ban on core First Amendment values, but on a claimed right of the party to select its standard bearer. Neither *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), nor Justice Scalia's dissent

in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the two cases cited by the Eighth Circuit, support the right asserted by the New Party to have a candidate listed on the ballot as its own when that candidate is already on the ballot as the candidate of another party.

The court of appeals also found support for the New Party's position in a right to broaden party participation, derived from language in *Tashjian* and *Norman v. Reed*, 502 U.S. 279 (1992). However, in each of those cases the challenged law restricted the growth of the party regardless of their popular support. The fusion ban does not impede anyone from associating with the New Party nor impose limits on the breadth of its development. The party's development is limited not by the law but by its lack of popular support.

The party wants the State to reconfigure its ballot not so that the party members can vote for the candidate of their choice – that candidate is already on the ballot. Rather, the New Party seeks *another* ballot position for that candidate so that it can demonstrate through the ballot the support it provided for that candidate. This misconceives the purpose of the ballot, which this Court has emphasized is to elect public officials, not to serve an expressive function. *Burdick v. Takushi*, 504 U.S. 428 (1992).

The Court has not required the government affirmatively to enhance opportunities for exercise of First Amendment rights. There is no good reason to do so now in the electoral arena. On the contrary, recognition of a right to demand an electoral system that maximizes minor parties' opportunity for success could require additional changes to vindicate that right, ranging from including a summary paragraph about the party on the ballot to requiring a system of proportional representation in a place of the current winner-takes-all approach.

Even if there were thought to be some impairment of core First Amendment values as a result of the ballot fusion ban, it could only be characterized as minimal when compared with the Court's ballot access cases in which state regulations precluded a party from having *any* candidate on the ballot. *Storer v. Brown*, in particular, imposed restrictions similar in nature but more stringent in effect, yet the Court upheld the California disaffiliation law at issue.

Finally, the ballot fusion ban serves several state interests in the integrity of the electoral system that this Court has consistently held are important, and even compelling. The ban avoids lengthy, complex ballots and thereby averts voter confusion. The regulation limits manipulation of the ballot that would turn it into a billboard for sloganeering or single issue politics. It helps to control factionalism and party splintering that the Court has recognized as dangers to an effective political system. These important governmental purposes outweigh any minimal burden on associational interests that the fusion ban imposes, and the decision of the Eighth Circuit that the law is unconstitutional was therefore wrong.

ARGUMENT

I. THE NEW PARTY'S CHALLENGE TO THE MINNESOTA BALLOT FUSION BAN IS SUBJECT TO A BALANCING TEST THAT MEASURES THE EXTENT OF IMPAIRMENT OF FIRST AMENDMENT RIGHTS AGAINST THE STATE INTERESTS SERVED BY THE BAN.

Challenges to state election laws concern the conflict of two important opposing interests. As the Court has often pointed out, "[t]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively . . . rank

among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)). On the other hand,

> [c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Burdick v. Takushi, 504 U.S. 428, ___, 112 S. Ct. 2059, 2063 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Because of the importance of the competing interests, the Court has acknowledged time and again that there can be no litmus-paper test to resolve these conflicts. Instead, the Court:

> must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights. . . . "

Burdick, 504 U.S. at ___, 112 S. Ct. at 2063 (citations omitted).

Realizing also that each provision of an election code "inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends[,]" *id.* at 2063, the Court has rejected application of strict scrutiny and a requirement of narrow tailoring for every election regulation. Instead, the Court has stated:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance. . . . " *But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.*

Id. at 2063-64 (emphasis added; citations omitted).

Application of this analytical construct to the instant case demonstrates, first, that the Minnesota ban on ballot fusion does not impair the New Party's right of association in any significant way. Second, the ballot fusion ban serves important state interests in a fair and orderly election process. Finally, because the law imposes at most minimal, reasonable, nondiscriminatory restrictions on First and Fourteenth Amendment rights, the important state interests outweigh any minimal burden that is imposed.

II. FIRST AMENDMENT RIGHTS ARE NOT IMPAIRED BY STATE LAWS THAT DO NOT ALLOW A CANDIDATE TO APPEAR ON THE GENERAL ELECTION BALLOT AS THE CANDIDATE OF MORE THAN ONE PARTY.

The central thesis of the New Party's argument, and of the ruling of the court below, is that the party's associational rights under the First Amendment include not only the right to select the standard-bearer of its choosing, but also, significantly, to have the candidate identified as such on the state's election ballot, even if the same candidate is also on the ballot as the candidate of another party. Moreover, the New Party would expand the

asserted right a step further, by assuming that the candidate and the party will have a separate line on the ballot such that voters can vote for the candidate as the candidate of the New Party and not as the candidate for the other party.[6] Additionally, the New Party and the Eighth Circuit believe the party has a protected First Amendment right to develop and grow through alliances with other parties, particularly in the form of sponsoring the same candidate on the election ballot. The Eighth Circuit held that because these rights are frustrated by the ballot fusion ban, it imposes a significant burden on the party's First Amendment rights that is not outweighed by the State's interests. However, nothing in this Court's jurisprudence or in the values that the First Amendment is intended to protect support this expansive interpretation of the freedom of association. In reality, the ballot fusion ban has no adverse impact on the legitimate associational rights of the New Party.

A. The Associational Rights Of Political Parties Reach Only As Far As The Core First Amendment Values They Are Intended To Serve.

There is, and can be, no dispute that this Court has held that the freedom of association implicit in the First Amendment extends to political parties. *E.g., Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). However, none of these cases have held that there is a First Amendment value in political parties as such.

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[6] Contrary to this assumption, a state law can permit multiple party candidacies, satisfying a party's desire to have the candidate of another party also appear on the ballot as its own, without providing the candidate with multiple ballot positions. Instead, the law could provide that the candidate's name and all the nominating parties must appear together in one ballot position.

Rather, political parties enjoy First Amendment protection because they are a vehicle through which individuals can exercise their First Amendment right to associate for the advancement of shared beliefs. Similarly, the cases that recognize First Amendment protection for minor political parties do not articulate a constitutional interest in the existence or the success of minor parties *per se*. Instead, the First Amendment value in minor parties is the contribution they provide to the diversity of political speech, the marketplace of ideas that is central to the First Amendment notion of free speech, through the offering of alternative candidates. Thus, it is the preservation of these core First Amendment values that drives this Court's decisions, not the advancement of political parties in general, or minor parties in particular.

The core First Amendment principle of the right to associate for the advancement of shared beliefs is at the heart of the cases that acknowledge a political party's right of association. In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down state laws that imposed significant restrictions on minor party access to the ballot because the laws "place[d] burdens on . . . the right of individuals to associate for the advancement of political beliefs. . . . " 393 U.S. 23, 30 (1968). This same central value is found in cases involving political party governance. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the Court addressed a dispute concerning the extent to which a state could interfere in a national political party's decision on which of two competing slates of delegates to seat at its national convention. In affirming the party's autonomy, the Court explained:

> The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs

> and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

Id. at 487 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973)). These principles were reiterated in another case, concerning a state law that attempted to regulate the voting of convention delegates, *Democratic Party of United States v. Wisconsin*, 450 U.S. 107 (1981). The Court again stated:

> This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State. . . . And the freedom to associate for the "common advancement of political beliefs," . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.

Id. at 121-22 (citations and footnote omitted). The Court again recognized the core "freedom to engage in association for the advancement of beliefs and ideas" in upholding the right of a party to open its primary election to non-party members despite a state law that did not permit "open" primaries. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). *See also Colorado Rep. Fed. Campaign Comm. v. F.E.C.*, ___ U.S. ___, ___, 64 U.S.L.W. 4663, 4670 (U.S. June 26, 1996) (Kennedy, J., dissenting) ("Political parties . . . exist to advance their members' shared political beliefs.").

Similarly, the core First Amendment value of diversity in political debate reverberates through the Court's election law cases. Thus, in a challenge to ballot access restrictions in Ohio's statutes, the Court emphasized that "[c]ompetition in ideas and governmental policies is at

the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). In a subsequent challenge to Ohio's ballot access restrictions, the Court made clear the connection between the value of diversity of candidates and the competition in ideas: "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794. This concern translated directly into an emphasis on the importance of presenting a diverse field of candidates to the voters:

> *Our primary concern is with the tendency of ballot restrictions "to limit the field of candidates from which voters might choose."* Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."

Id. at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)) (emphasis added).

In summary, while the Court's cases addressing state restrictions on access of political parties to the ballot and otherwise regulating party activities acknowledge party rights of association, the underlying source of these rights is core First Amendment values. It is not the advancement of the party that requires recognition of party rights, but the bedrock principles of fostering competition of ideas and of permitting association for the advancement of those ideas.

B. The Minnesota Ban On Multiple-Party Candidacies Does Not Burden First Amendment Rights.

In evaluating a challenge to state election laws, a court must first ascertain "the character and magnitude

of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. . . . " *Burdick v. Takushi*, 504 U.S. 428, ___, 112 S. Ct. 2059, 2063 (1992) (quoting *Anderson*, 460 U.S. at 789). The Eighth Circuit applied the correct methodology, first undertaking this inquiry into the extent of the burden on the New Party's First Amendment rights. However, it reached the wrong conclusion, deciding that "[t]he burden on the New Party's associational rights is severe." Pet. App. 5.

As demonstrated *infra*, the court erred because it failed to evaluate the impact of the State's ballot fusion ban on the core First Amendment values on which this Court's decisions are founded. As a result, the Court construed more broadly than warranted two specific aspects of political parties' associational rights alluded to by this Court. Those associational rights were, first, the right "to select a standard bearer who best represents the party's ideologies and preferences," *id.* (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)), and second, the right to "broaden the base of public participation in and support for [the party's] activities." *Id.* (quoting *Tashjian*, 479 U.S. at 214).

1. The ban on ballot fusion does not interfere with core First Amendment values.

The Eighth Circuit did not discuss at all the impact of Minnesota's fusion ban on the core First Amendment values that give rise to those associational rights that political parties enjoy. Had it done so, it would necessarily have concluded that there is no burden on those rights.

One of the core interests is the ability of individuals to associate for the advancement of shared beliefs. Nothing in the Minnesota law impairs the ability of New Party

members to engage in this kind of protected group activity. The party can identify issues that it wishes to address and on which its members share common beliefs. It can engage in political speech to advance its members' shared views on those issues. The party can select a candidate who best represents the membership's views. It can identify that candidate as the choice of the party for office; it can work for his or her election by raising money and campaigning for the candidate. Ultimately, party members can vote for the candidate. The members of the New Party can participate in all the collective political activity that the First Amendment protects.

The only limitation imposed by the fusion ban is that if the party members select as their preferred candidate a person who will already be on the ballot as the candidate of another party, the New Party name will not appear on the ballot with their chosen candidate. The effect, if any, of this restriction on members' ability to associate for the advancement of shared beliefs is minuscule.

The second core First Amendment value on which party rights are ultimately grounded, especially those of minor parties, is the interest in diversification of choices to enhance the marketplace of ideas. As applied to the New Party, the Minnesota ban on ballot fusion has no negative impact on this value. In fact, the concept of ballot fusion undermines this core value by reducing the variety of candidates that otherwise might be available to voters if each party chose a separate candidate.

Significantly, the law challenged here does not have the same effect as those attacked in cases such as *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Bullock v. Carter*, 405 U.S. 134 (1972). In those cases, filing deadlines, filing fees and other state-imposed restrictions precluded independents and minor parties from placing candidates on the ballot,

thus reducing the choices available to voters. The important adverse consequence for First Amendment purposes, as explained by the Court, was that "such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson*, 460 U.S. at 794. Unlike the plaintiffs in cases such as *Anderson*, *Williams*, and *Bullock*, and unlike most minor political parties in Minnesota, the New Party did not seek to enrich political discussion by nominating its own candidate to present its own political viewpoint to the public. Instead, the New Party sought to offer as its candidate a very popular political figure who was already on the ballot as the candidate of another, established party. This would have done nothing to enhance the choice of candidates available to voters. Nor does it in reality present additional ideas to the voters. It can hardly be said that Rep. Dawkins would meaningfully represent one set of positions to the voters as the candidate of the DFL party and a different set of positions to the voters as the candidate of the New Party.

Contrary to the conclusion of the court below, the state prohibition on ballot fusion does not seriously impair the basic First Amendment values that the associational rights of political parties are intended to serve. A ban on fusion candidacies does not interfere with the ability of party members to associate for the advancement of shared ideas, nor does it have any genuine negative effect on the diversity of candidates available to voters. Accordingly, the court of appeals should have concluded that the ballot fusion ban imposes no burden on First Amendment rights of the New Party.

2. The Minnesota ballot fusion ban does not impair any legitimate right to select a party standard bearer.

In concluding that the ban on fusion candidacies severely impairs the New Party's associational rights, the court of appeals did not address the effect on core First Amendment values, but evaluated the impact on two more specific "party" rights. The first was the right of a political party " 'to select a standard bearer who best represents the party's ideologies and preferences.' " Pet. App. 5 (citation omitted). The court deemed this right severely burdened because "[t]he New Party cannot nominate its chosen candidate when the candidate has been nominated by another party despite having the candidate's and the other party's blessing." *Id.*[7] As applied in this case, the court of appeals construed that right to select a standard bearer as entitling the New Party not only to select as its candidate the candidate of another party, but also to have that candidate appear on the ballot as the candidate of the New Party (as well as the candidate of the other party). In addition, the court's rationale assumes that the candidate will appear on a separate line on the ballot for each party that nominated him. The cases relied on by the court and the New Party do not establish such a right.

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[7] It is worth noting that there is no basis in the record for the court's factual statement that the New Party had "the other party's blessing." The court was correct in stating that "[t]he DFL did not object to the New Party's nomination of Dawkins." Pet. App. 2. However, the absence of DFL objection should not be construed as support. There was no opportunity or reason for the DFL to make such an objection because the law prohibited the dual candidacy and the nominating petition of the New Party was therefore rejected by the county election officials.

To be sure, common sense dictates that the associational rights of political parties must include some degree of freedom to choose the candidates with whom the party members will associate. Nevertheless, neither the decisions of this Court nor the legal principles on which they are based require that the right to select a party's candidate requires that the state put that candidate on the ballot more than once, as the candidate of multiple parties.

The court of appeals relied first on *dicta* from this Court's opinion in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989). That case involved a significantly different type of state regulation than is at issue here. The California law challenged in *Eu* prohibited the party, as an organization, from supporting and endorsing any candidates in its primary election. The Court held that this muzzling of the party violated its right of free speech because it "directly hamper[ed] the ability of a party to spread its message and hamstr[ung] voters seeking to inform themselves about the candidates and the campaign issues." *Id.* at 223. The Court added that the party's right to associate was also burdened by the prohibition. Justice Marshall, writing for the Court, stated:

> *Freedom of association means* not only that an individual voter has the right to associate with the political party of her choice, [citations omitted] but also *that a political party has a right* to " 'identify the people who constitute the association,' " [citations omitted] and *to select a "standard bearer who best represents the party's ideologies and preferences." Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933 (1976).

Eu, 489 U.S. at 224 (emphasis added). The Court explained that the law interfered with associational rights because it imposed restrictions on "individuals wishing to band together to advance their views [the party organization] . . . , while placing none on individuals [individual members of party central committees]." *Id.* at 224-25.

The language in *Eu* about selection of a standard bearer does not establish, or even suggest, the expansive right asserted by the New Party. *Eu* involved regulation of the party's internal candidate selection process that silenced the party completely with regard to candidates in the primary. Nothing in the Minnesota law has any such effect. The New Party remains free to choose a "standard bearer who best represents the party's ideologies and preferences," and to endorse, support and campaign for that candidate, even if that person is also the candidate of another party.[8] The only limitation is that if the New Party selects someone who is already the candidate of another party, the candidate cannot appear on the general election ballot as the candidate of both parties. Nothing in *Eu* suggests that this result interferes with the party's associational rights.[9]

The Eighth Circuit also cited Justice Scalia's reference to the right of a party to select its standard bearers in his

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[8] Indeed, this ability to endorse, support and campaign for a candidate was precisely what the party was prohibited from doing at the primary stage in *Eu*.

[9] Nor does the case from which Justice Marshall borrowed the "standard bearer" quotation support the New Party's position. Like *Eu*, neither the *Ripon Society* case, which was about the validity of the party's convention delegate selection process, nor Judge Tamm's concurring opinion which Justice Marshall quoted, said anything about a party's right to have its chosen candidate appear on the ballot even if he was already on the ballot for another party.

dissent in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 234 (1986). Like *Eu*, *Tashjian* involved a question about the process by which a political party selected its candidates. The Republican Party of Connecticut wanted to change its rules so that individuals who were not members of the party could vote in its primary elections, but state law did not permit such "open" primaries. *Id.* at 210-11. The Court held that the state could not restrict the party's choice of who could participate in its primaries, explaining that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224.

Justice Scalia, joined by the Chief Justice and Justice O'Connor, dissented. *Id.* at 234. Justice Scalia reasoned that the minimal relationship between the Republican Party and an individual who refused to join the party and whose only contact with the party was to vote in its primary should not qualify as an association deserving of constitutional protection. *Id.* at 235. Justice Scalia contrasted with this casual contact the "ability of members of the Republican Party to select their own candidate" which, he wrote, "unquestionably implicates an associational freedom," but was not burdened there. *Id.* at 235-36. Accordingly, Justice Scalia's reference to the right of a party to select its candidates says nothing about the right asserted here – to select the candidate of another party and have that candidate appear on the ballot as the candidate of two (or more) parties.

The Eighth Circuit decision expands the right of a political party to select a standard bearer beyond anything this Court has recognized. More importantly, such an expansive right is not necessary to preserve the core First Amendment values from which a party's associational rights arise.

3. The ballot fusion ban does not impair a properly construed right of a party to broaden its support.

The Eighth Circuit opined that a second aspect of the New Party's associational rights was affected by the ballot fusion ban. First the court identified the right: "Parties also have an associational right to 'broaden the base of public participation in and support for [their] activities,' *Tashjian*, 479 U.S. at 214." Pet. App. 5. It then concluded that right was severely burdened "because Minnesota's laws keep the New Party from developing consensual political alliances and thus broadening the base of public participation in and support for its activities." Pet. App. 6.

The flaws in the court's conclusion are illuminated by an understanding of the basis for the New Party's contention that a fusion ban interferes with its right to broaden the base of public support. The New Party argues that third parties cannot attract and maintain public support unless they can elect candidates to office. It asserts that third parties can overcome this obstacle only by nominating popular candidates of major parties as their own and having their own separate line on the ballot for that candidate. The court of appeals apparently agreed, stating:

> When a minor party and a major party nominate the same candidate and the candidate is elected because of the votes cast on the minor party line, the minor party voters have sent an important message to the candidate and the major party, which gets attention for the minor party's platform.

Id.

As explained in more detail below, the court of appeals conclusion that the New Party's right to develop

alliances and broaden public support is severely burdened is wrong for numerous reasons. First, it is based on a dubious generalization that without fusion third parties cannot succeed and with it they will. Second, it expands a political party's right to broaden its public support far beyond the bounds established by this Court. Finally, it misconceives the function of the election ballot as a means of measuring party support rather than of electing public officials. This misconception transforms the right of a political party to seek to expand its public support without unjustified government restrictions into an obligation on the state to maximize the opportunities for third party success.

Contrary to the court's apparent conclusion and the New Party's argument, ballot fusion is not the only, or necessarily the most effective, possible means of political alliance. The challenged laws do not prevent the New Party from forging short or long-term alliances with friendly rival parties by merger[10] or cooperation. The New Party may pool its campaign funds and workers with other parties, negotiate agreements not to field opposing candidates and jointly campaign for the same candidate.

Citing a law review note,[11] the court appears to accept the New Party's thesis that the decline of third parties was largely attributable to the enactment of fusion ban legislation at the turn of the century and that in the absence of fusion bans, minor parties will thrive and eventually be able to elect their own candidates to office. Neither of those propositions is necessarily accurate.

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[10] The DFL is the product of merged parties. *See generally* John E. Haynes, *Dubious Alliance* (1984).

[11] William R. Kirshner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 Colum. L. Rev. 683 (1995).

Several reasons other than fusion ban legislation have been suggested for the decline in the role of minor parties. For example, one writer opines that "[t]he direct primary and the decentralization of party authority, then, have virtually eliminated the need for third parties as instruments for expressing dissident views in state politics." Howard R. Penniman, "The Party Structure" in *The Party Symbol: Readings On Political Parties* 101, 105 (William Crotty ed., 1980). *See also* Declaration of Walter Dean Burnham, para. 6 ("It is well known that such first-past-the-post or winner-take-all electoral regimes create formidable barriers to the electoral viability of third parties."), J.A. 13; Steven J. Rosenstone, et al., *Third Parties In America: Citizen Response To Major Party Failure* 19-25 (1984) (identifying ballot access restrictions, not including fusion bans, that make minor party success difficult). In addition, there is no evidence in the record (or elsewhere as far as Petitioners know) that fusion bans prevent third parties from gaining sufficient political strength to win state legislative seats on their own. Thus, in Alaska and New Hampshire, where fusion is banned, a minor-party candidate served in the respective state Houses as of April 1996. The Council Of State Governments, 31 *The Book Of The States* Table 3.3 at 68 (1996-97 ed.).

Nor is the converse proposition – that where fusion is permitted, minor parties will thrive – unassailable. All of the examples of the success of third parties where fusion is permitted cited by the New Party, the Eighth Circuit and the sources they rely on come from New York. However, fusion is permitted, or at least not prohibited, in seven states.[12] In six of those states, Arkansas, Connecticut, Idaho, Oregon, New York and Utah, there were no

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[12] Those states are Arkansas, Connecticut, Idaho, Oregon, New York, Vermont and Utah. See note 4, *supra*.

third-party legislators in April 1996. *Id.* Furthermore, electoral history available for elections from 1972 to the present demonstrates that of the states that permit fusion, New York is the only one in which multiple party candidacies occur with any frequency. Specifically, in the six fusion states other than New York, in the elections for governor, United States Senator and U.S. Representative from 1972 through 1994, only four candidates have run on the ticket of more than one party.[13] *See* Michael Barone, Grant Ujifusa, et al., *The Almanac of American Politics 1976* (1975) and similar volumes by the same authors for the years 1978, 1980, 1982, 1984, 1986, 1988, 1990, 1992, 1994 and 1996. Obviously, the absence of a ban on cross-filing in those states has not resulted in any significant ballot fusion activity in all those elections. Thus, it appears that New York is simply an anomaly that does not represent the typical result where fusion is permitted. The Court should not establish a constitutional mandate to permit ballot fusion that would require some forty states to abandon their long-standing laws, on the theory that fusion is a necessary and sufficient ingredient for the success of third parties based on anecdotal evidence from only one state.

The court of appeals was also mistaken in its interpretation of the scope of a political party's right "to broaden the base of public participation." Pet. App. 6.

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[13] Those four candidates were: one for U.S. Senator and three for U.S. Representative in the 1992 election in Connecticut. The candidates each ran as the nominees of both the Democratic Party and the A Connecticut Party. The latter party was the third party formed by former Senator Lowell Weicker for his run for governor of the state and was named so it would appear first alphabetically on the ballot. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1994*, at 237, 242, 245, 248, 250 (1993).

The court misconstrued this Court's cases concerning that aspect of party associational rights, and as a result erroneously concluded that the New Party's rights were severely impaired by the ban on ballot fusion.

The Eighth Circuit relied on the "broaden the base of public participation" language found in *Tashjian v. Republican Party Of Connecticut*, 479 U.S. 208, 214 (1986). As discussed above, that case was a challenge by the Republican Party to a state law that prohibited the party from holding an open primary, that is, one in which people not registered as party members could vote. The party wanted to open its primary so that it could attract the support of independents, who formed a large proportion of the state's voters. *Id.* at 212. This was the nature of the attempt "to broaden the base of public participation in and support for" the party's activities to which the Court in *Tashjian* referred. The Court explained that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.' " *Id.* at 214 (quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981)). Thus, the associational freedom at issue was the ability to open up the party's candidate selection process to an additional category of voters from whom to seek support and with whom potentially to share political beliefs. The state law had the effect of preventing the party from redefining the participants in its nominating process, and no matter how much support those voters would provide, they could not participate in the party function because of the state restriction.

The other case relied on by the court of appeals was *Norman v. Reed*, 502 U.S. 279 (1992). In Norman, the Harold Washington Party became an "established political party" in the City of Chicago by getting more than 5%

of the vote in elections. *Id.* at 283. The following year supporters of that party who were located in the suburban areas of Cook County (in which the City of Chicago is located), attempted to run candidates under the same party name in suburban Cook County. *Id.* at 284. Even though the Harold Washington Party in the city had authorized the use of its name, the Illinois Supreme Court held that use of that name in the suburbs was barred by a state statute prohibiting a "new political party" from using the same name as an "established political party." *Id.* at 286-87. The Court acknowledged that its cases had recognized the "right of citizens to create and develop new political parties." *Id.* at 288.[14] The Court held that the law would "obviously foreclose the development of any political party lacking the resources to run a statewide campaign." *Id.* at 289. This was so because the effect of the law was to prevent a small party from expanding from one geographic area into another without changing its name. *Id.* Because that severe impact was not justified by a sufficient state interest, the law was struck down. *Id.* at 293-94.

Like the law in *Tashjian*, the law in *Norman* imposed a limit on the growth of the party that would operate regardless of popular support. In *Tashjian*, no matter how much support the Connecticut Republicans might find in the independent voters, the law precluded them from associating together in the primary. Similarly, in *Norman*, no matter how much support there was for the Harold Washington Party in suburban Cook County, the party could not expand there.

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[14] The Court explained that this right "advances the constitutional interest of likeminded voters to gather in pursuit of common political ends. . . . " 502 U.S. at 288. Therefore, this right to develop parties also is grounded in one of the core First Amendment values discussed above at 14-17.

In contrast, the Minnesota ban on ballot fusion imposes no such arbitrary limit on the development of the New Party. Unlike the circumstances in *Tashjian* and *Norman*, here the state law does not prevent anyone from associating with the New Party. The party can operate in any part of the state in which it can find supporters. It can nominate and support candidates in any part of the state. The party can invite any voter to join the party in its support of its favored candidates. The New Party's development is limited, if at all, only by its lack of popular support, not by state law.[15]

The New Party does not seek to eliminate a state law that prevents it from taking advantage of its own strength or naturally expanding its support. Rather, it wants the state to revise its ballot format so the party can take advantage of the strength of a candidate of another party. The New Party's and the circuit court's rationale is that the party can become a "durable, influential player in the

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[15] The Eighth Circuit relied on *Norman* for another point. The court rejected the suggestion that the burden on the New Party's rights is insignificant because the fusion ban only eliminates one possible candidate. Pet. App. 4-5. The court cited *Norman* in support of this rejection, apparently accepting the New Party's argument that since the party in *Norman* was free to use any other name, the situations are analogous. *Id.* at 6. They are not, however. The impact in *Norman* was far more severe. It meant that any party that wanted to grow gradually into additional geographic parts of the state would have to change names each time it expanded to avoid the ban on adoption of an existing name, thus risking confusion and loss of support in both the new area and in the established areas. In contrast, the ban on ballot fusion means only that party members must choose between voting for their preferred candidate, even though identified on the ballot with another party, and nominating another candidate who can appear on the ballot with their party name.

political arena," App. 6, only if it can demonstrate its strength at the ballot box, and it can do this only if it can appear on the ballot as the sponsor of popular, major party candidates. The court's conclusion that the state has a constitutional obligation to alter its ballot to enable this strategy fundamentally misconceives the purpose of the ballot and the extent of the state's obligations under the First and Fourteenth Amendments.[16]

In contrast to the approach of the Eighth Circuit, this Court has repeatedly stated that "the function of the election process is 'to winnow out and finally reject all but the chosen candidates.' " *Burdick v. Takushi*, 504 U.S. 428, ___, 112 S. Ct. 2059, 2066 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). The Court expressly rejected "[a]ttributing to elections a more generalized expressive function." *Id.* Thus, the Court refused in *Burdick* to require Hawaii to provide for write-in voting where its ballot access laws were constitutionally adequate. The Court explained:

> In such situations, the objection to the specific ban on write-in voting amounts to nothing more than the insistence that the state record, count

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[16] Judge Ripple, in his dissent from the denial of rehearing en banc in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), relied on the same misconception of the ballot as a communication device. Foreshadowing the similar statement of the Eighth Circuit, Judge Ripple wrote:

> If a person standing as the candidate of a major party prevails only because of the votes cast for him or her as the candidate of a minor party, *an important message has been sent* by the voters to both the candidate and to the major party.

Id. at 389 (emphasis added).

> and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system. . . . [W]e discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws.

Id. at 2067. See also *id.* at 2069 (Kennedy, J., dissenting) ("[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression"). There is, likewise, no constitutional obligation on the states to tailor their general election ballots to serve as polling mechanisms to gauge the relative strength of parties.[17]

What the New Party in reality argues for is a state obligation to structure its electoral system, and its election ballot in particular, in order to maximize the ability of minor parties to develop popular support. The First Amendment does not require the government to provide

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[17] Justice Scalia expressed a similar thought in *Tashjian*. In response to the argument that the Republican Party should be permitted to allow independent voters to participate in its primary so that it could offer candidates that would attract those voters in the general election, he stated:

> The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of support among Party members and independents combined. *The State is under no obligation, however, to let its party primary be used, instead of a party funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents.*

479 U.S. at 236 (Scalia, J., dissenting) (emphasis added). Nor should the State be obligated to provide separate line and party identification on its general election ballot so that a minor party can demonstrate its strength to the candidate, its own voters or others.

what may be the most effective way to exercise a protected right. Accordingly, the Court explained that "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation." *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)) (additions and deletions in Court's quotation). In *Regan*, the Court stated that the plaintiff lobbying organization did not have as much money as it wanted and therefore could not exercise its freedom of speech as much as it would like. *Id.* at 550. Nevertheless, the Court ruled that it was not entitled to a government subsidy in the form of tax breaks so that it could maximize its exercise of free speech. *Id.* at 551.

Here, the New Party lacks not money, but sufficient voter support to exercise as fully as it would like its right to participate in the electoral process. As in *Regan*, the state is not required to configure its ballot so that the New Party can overcome its shortcomings and maximize its political prospects. Although the Court has struck down unjustified impediments imposed by the state on a party's opportunity to grow, it has never suggested that the First and Fourteenth Amendments require states affirmatively to aid parties in their efforts to expand popular support. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986) ("States are not burdened with a constitutional imperative to . . . 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot."). Even the New Party agrees that "[t]he Constitution does not mandate the encouragement of minor parties. . . . " Brief For Plaintiff-Appellant filed in Eighth Circuit at 27.

Indeed, establishing a right to affirmative efforts by states to optimize the electoral environment for third

party success would lead far beyond elimination of fusion bans. For example, a minor party could argue that its ability to gather public support is contingent on having a short paragraph stating its principles on the ballot. The right created by the Eighth Circuit's decision could require that relief. On a broader scale, just as the Eighth Circuit accepted the political science theories adverse to fusion bans here, another court could accept the theory that the failure of third parties to thrive is the result of the institution of direct party primaries. Penniman, *The Party Symbol: Readings on Political Parties, supra*, at 105. Would states then have an obligation to modify those laws to make the system more amenable to third party success? Others have theorized that it is the "winner-takes-all" electoral system that provides the most significant barrier to third party success. Burnham Declaration, *supra*, para. 6, J.A. 13. A system of proportional representation would certainly be more hospitable to the election of third party candidates and the continued success of minor parties. That drastic change could also be argued as part of the constitutional mandate.

The right of parties to broaden their base of support should remain grounded in core First Amendment principles. It should not be expanded into an obligation to tailor election ballots to foster third party success.

C. The Ban On Multiple-Party Candidacies Is Less Restrictive Of First Amendment Values Than Statutes Upheld In Other Cases And Any Impairment Of Associational Rights Is Therefore Minimal.

Even if the Court were to conclude that there is some impairment of the New Party's associational rights from the ballot fusion ban, a proper focus on the core First Amendment values discussed earlier establishes that it is

minimal. This conclusion is reinforced by comparison of the challenged Minnesota fusion ban to more restrictive election laws that have been upheld. In upholding ballot access restrictions imposed by the state in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Court noted that the challenged statute was "more accommodating of First Amendment rights and values than were the statutes we upheld" in several prior cases. *Id.* at 198. Thus, it is appropriate to subject the ballot fusion ban to the same comparison.

As discussed above at 19-20, the Minnesota law is far less restrictive than statutes upheld by the Court that completely barred minor parties from the ballot. *E.g.*, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Williams v. Rhodes*, 393 U.S. 23 (1968), and *Bullock v. Carter*, 405 U.S. 134 (1972). Here, the New Party was eligible to put anyone of its choosing on the ballot as its own candidate, except Rep. Dawkins and his opponent. Moreover, Rep. Dawkins was on the ballot if New Party members wanted to vote for him as the candidate who best represented their views.

Storer v. Brown, 415 U.S. 724 (1974), is another persuasive illustration that Minnesota's regulation does not unconstitutionally burden First Amendment rights. The restrictions placed upon independent or minor party candidates by the California statutory scheme upheld in *Storer* were of the same type as the restrictions placed on the New Party by the Minnesota law, but the former were substantially more severe. Even in light of the more severe restrictions, the Court in *Storer* upheld the California law.

In *Storer*, the Court upheld the California ballot access law that forbade candidates from being nominated as independents in the general election if they had been registered as affiliated with a qualified political party

within one year prior to the primary election in that year. California Elections Code, § 6830(d) (Supp. 1974), reprinted in *Storer* appendix, 415 U.S. at 752.[18]

Two of the plaintiffs in *Storer* wanted to run for Congress in the 1972 general election as independents, but were barred because they were registered Democrats until January and March, 1972. *Id.* at 728. Plaintiffs challenged the disaffiliation statute on the grounds that it posed an unconstitutionally severe burden upon the right to vote and associate for political purposes under the First and Fourteenth Amendments. *Id.* at 729.

The disaffiliation statute upheld in *Storer* was far more restrictive of the rights of independent candidates or minor parties who wished to nominate candidates than the statutes at issue in this action. First, in California a minor party was barred from nominating not only a current candidate of another party, but anyone affiliated with any other party. This would have barred a minor party from considering thousands of possible candidates on the basis that they were registered members of the Democratic, Republican, or other parties. In this action, the New Party was barred from nominating only Rep. Dawkins and the other major party candidate already nominated for the same seat.

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[18] As noted by the Court, 415 U.S. at 733, a substantially equivalent provision provided that a candidate for partisan office on behalf of a party would be rejected if the candidate had been registered as affiliated with another political party within 12 months prior to the filing of the declaration of candidacy. California Elections Code, § 6401 (Supp. 1974), reprinted in *Storer* appendix, 415 U.S. at 752. In effect, this meant that a person affiliated with a political party who wanted to run as an independent or for another political party would have to disaffiliate from his original party approximately 17 months before the general election. 415 U.S. at 758 (Brennan, J., dissenting).

Second, in California a minor party might have to begin its search for a candidate more than 17 months before the general election to avoid the disaffiliation problem. In Minnesota, a minor party has until July of the election year to persuade a potential candidate affiliated with another party to be its candidate.

Finally, the California statute operated as "an absolute ban to candidacy" for many potential candidates. *Storer*, 415 U.S. at 737. In contrast, the statute at issue herein does not result in anyone being absolutely excluded from the ballot; it only bars Rep. Dawkins from being listed twice.

The extremely far-reaching nature of the restrictions upheld in *Storer* is illustrated by the views of the dissenting Justices that California's interests could just as easily be served by "less drastic means." Specifically, they suggested that the disaffiliation requirement be set closer to the primary date, rather than over a year earlier, and that it only apply to those potential candidates who had actually run in a party primary. *Id.* at 761-62 (Brennan, J., dissenting). These "less drastic means" are essentially what the Minnesota regulation requires. Those candidates who choose to run in a major party primary, such as Rep. Dawkins, are precluded from otherwise being on the ballot in the general election. Those candidates who choose to run as independents or as minor party candidates must choose to disaffiliate from a major party close in time to the primary.

In the instant case, the New Party has argued, and the district court agreed, that *Storer* is distinguishable because "the disaffiliation rule at issue in *Storer* was directed at 'sore losers' " and because Rep. Dawkins was not a sore loser, but "a willing participant." Pet. App. 19. *Storer* should not be read so narrowly. The statutes at

issue in *Storer* did have the legitimate purpose of preventing "sore loser" candidacies, in which a defeated primary participant runs in the general election as an independent or a minor party candidate in an effort to split his party's vote.[19] However, California's statutes applied to a far broader range of situations than the "sore loser" situation and were justified by compelling state interests other than the rationale of avoiding the "sore loser" scenario. *Storer*, 415 U.S. at 732-36.

Furthermore, the two plaintiffs in Storer were not "sore losers." They were simply Democratic Party members, rather than defeated Democratic Party primary participants. *Id.* at 728. Indeed, if the Court had upheld the disaffiliation statute solely or even primarily based upon the rationale of preventing sore loser independent candidates who threaten to factionalize and splinter their former party, it would have been difficult to rationalize applying the statute to the situation of the two plaintiffs.

This Court has never questioned the continuing validity of *Storer*, nor given any indication that it reads *Storer* as applying only to the "sore loser" situation. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the Court held that Ohio's early filing deadline for independent candidates for President placed an unconstitutional burden on that candidate and his supporters. In distinguishing *Storer*, the Court recognized the validity of a disaffiliation statute which still permits an independent-minded group or a minor party to gain access to the ballot with some candidate:

> Our focus on the associational rights of independent-minded voters distinguishes the

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[19] As noted by the Court, *id.* at 733, California also had other statutes specifically barring the sore loser scenario, Code, §§ 6402 and 6611, reprinted in Storer appendix, 415 U.S. at 748, 751.

> burden imposed by Ohio's early filing deadline from that created by the California disaffiliation provision upheld in *Storer v. Brown*,. . . . Although a disaffiliation provision may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements.

460 U.S. at 791 n.12 (citation omitted). In addition, the four Justices who dissented in *Anderson* relied extensively upon the holding in *Storer*. *Id.* at 812 (Rehnquist, J., dissenting).[20]

The far more restrictive statutes upheld by this Court in *Storer* and other ballot access cases confirm that the Minnesota ban on ballot fusion is not a significant intrusion on First Amendment rights. The Eighth Circuit was mistaken in ruling that the Minnesota ballot fusion ban severely impairs the New Party's associational rights.

III. THE IMPORTANT REGULATORY CONCERNS ADVANCED BY THE STATE'S BAN ON BALLOT FUSION OUTWEIGH THE MINIMAL IMPAIRMENT OF THE NEW PARTY'S ASSOCIATIONAL INTERESTS.

Properly analyzed, the ballot fusion ban does not burden the New Party's associational rights, and no

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[20] If the Court intended that *Storer* be read simply as permitting a state to disallow the sore loser scenario, *Anderson* would have been the time for the Court to so indicate. The dissenting Justices argued that *Storer* required upholding the Ohio law because John Anderson, like the plaintiffs in *Storer*, simply waited too late before deciding to pursue an independent candidacy. 460 U.S. at 812-17. The Court could have rejected the dissent's reliance upon *Storer* by noting that *Storer* dealt with the sore loser situation, which was not present in *Anderson*. *See id.* at 804 n.31. Instead, the Court distinguished *Storer* on other grounds. *See, e.g., id.* at 802-05.

further inquiry is necessary under the *Anderson v. Celebrezze*, 460 U.S. 780 (1983) balancing test. Nevertheless, if the Court were to conclude that there is some minimal impairment of rights, additional consideration is necessary. Where challenged state regulation of the electoral machinery does not severely burden associational rights protected by the First Amendment, the legislation is not subject to strict scrutiny and need not be narrowly tailored. *Burdick v. Takushi*, 504 U.S. 428, ___, 112 S. Ct. 2059, 2063 (1992). Rather, the Court recognizes that substantial regulation of elections is necessary as a practical matter, and that the State's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788 (footnote omitted).

Minnesota's ballot fusion ban even-handedly reduces voter confusion by simplifying the ballot, promotes candidate competition by reserving limited ballot space for opposing candidates and prevents electoral distortions by ballot manipulation. These important State interests, either each alone or in combination, outweigh the minuscule burden imposed on the New Party's associational interests.

A. A Ballot Fusion Ban Reduces Voter Confusion.

A fusion ban reduces voter confusion by keeping the ballot simple. The court of appeals erred in requiring the State to produce evidence in the record or from history showing that a fusion ban reduces voter confusion when casting a ballot. Pet. App. 9. Such evidence is not required when, as here, an asserted right "threatens to interfere with the act of voting itself. . . . " *Burson v. Freeman*, 504 U.S. 191, 209 n.11 (1992).

> To require States to prove actual voter confusion . . . as a predicate to the imposition of

> reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986).

Fusion invites the development of longer and more complex ballots. The reason is that fusion opens opportunities for candidates, parties and interest groups to use the ballot to seek advantages beyond the election of favored candidates, especially when getting on the ballot is as easy as Minnesota makes it. *See* Minn. Stat. § 204B.08, subd. 3 (1994) (nominating petition signature requirements for various offices, including 500 or less for legislative office).

For example, a candidate can use the fusion ballot to get his name listed as many times as possible on the ballot under multiple party names in the hopes of getting more voter attention. A candidate could use the opportunity for multiple party filing to associate his name with popular slogans on the ballot. A minor party can use the fusion ballot to associate with a popular major-party candidate in the hopes of gaining enough votes to win major-party status at the next election. Single-issue interest groups can use the fusion ballot to nominate major-party candidates in the hopes of convincing party leaders to retain, add or modify particular platform planks. These

opportunities presented by fusion tend to make the ballot longer and more complicated.

However, fusion may not benefit the voter at all. A fusion ballot, compared with a nonfusion ballot, either lists more parties next to a candidate's name or contains additional voting lines for each party nominating the same candidate. No exit poll of voters is needed to appreciate "[t]hat 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate. . . ." *Lubin v. Panish*, 415 U.S. 709, 715 (1974). More specifically, in *Swamp v. Kennedy*, 950 F.2d 383, *reh'g denied*, 950 F.2d 388 (7th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992), the court observed that "[w]ithout a ban on multiple party nominations, an unlimited number of minority parties could nominate the candidate of a major party for the same office, causing serious confusion for voters." *Id.* at 386. *Cf. Packrall v. Quail*, 192 A.2d 704, 706 (Pa. 1963) (without state regulation, general election ballot may become "cluttered by candidates who are seeking to multiply the number of times their names appears on the ballot under various and inviting labels.").

Confusion by fusion is not merely judicial speculation. Others have noticed it. For example, a political scientist reported that fusion in New York "created the somewhat confusing picture of Mayor LaGuardia running under not less than nine different party labels in the course of his career. In the mayoralty campaign of 1941 alone his name appeared on four different tickets." G. Theodore Mitau, *Judicial Determination Of Political Party Organizational Autonomy: Some Recent Developments In The Law Of Parties (1936-1957)*, 42 Minn. L. Rev. 245, 256 (1957) (footnote omitted).

Minnesota has an important interest in avoiding voter confusion. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). It need not wait for real voters to be confused

before requiring a candidate to choose the single nominating party that best reflects his political beliefs and policies.

B. A Ballot Fusion Ban Promotes Candidate Competition By Reserving Limited Ballot Space For Opposing Candidates.

A ballot fusion ban promotes candidate competition by reserving limited space on the general election ballot for opposing candidates. Otherwise, minor-party candidates can coast along by nominating a major party candidate, thereby shortchanging voters of the diversity of candidates that better serves the core First Amendment values.

The Court's ballot access cases give high priority to presenting voters with candidates most likely to offer different ideas about what the government should do and how it should do it. Its "primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' " *Anderson*, 460 U.S. at 786 (citation omitted). In other words, ballot access restrictions should not, at least not without good reason, "reduce diversity and competition in the marketplace of ideas." *Id.* at 794.

A ballot fusion ban does not reduce the candidate choices available to voters or shrink the spectrum of ideas that opposing candidates are able to offer. On the contrary, it encourages minor parties to present candidates for election who may have been overlooked by the major parties. Such candidates may sometimes have useful ideas about government that were rejected or not considered by the major parties. *See, e.g., Sweezy v. State of New Hampshire*, 354 U.S. 234, 251 (1957) (Warren, C.J., plurality opinion) (absence of minority voices advocating ideas often ultimately accepted "would be a symptom of grave

illness in our society."). A ballot fusion ban promotes the diversity that the Court's ballot access cases seek to preserve by encouraging parties to chose their own candidates.

C. A Ballot Fusion Ban Prevents Electoral Distortions By Preventing Certain Ballot Manipulations.

A ballot fusion ban is also justified by the State's compelling interest in preserving the integrity of its election process. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). It prevents manipulation of the ballot by a) "raiding" of new major parties to gain short-term political advantage; and b) nomination of a popular major party candidate by a minor party simply to gain the status of a major party.

Cross-filing exposes a new but relatively weak major party to "raiding" by an established major party. Thus, for example, an established major party may decide that it would be to its advantage for its nominee to also appear on the ballot as the Reform Party nominee. If the Reform Party is relatively small, supporters of the established major party candidate could outvote supporters of the Reform Party's "real" candidate in the Reform Party primary. New York, the leading fusion state, is not immune from similar conduct. *See Zuckman v. Donahue*, 80 N.Y.S.2d 698, 700-01 (App. Div.) (upholding right of American Labor Party to cancel registration of former Democrats who, "prompted by ulterior motives," were "part of a prearranged plan to seize control."), *aff'd*, 81 N.E.2d 371 (N.Y. 1948).

In addition, a minor party may manipulate a fusion ballot solely to achieve status as a "major political party." A minor party permitted to nominate a popular major-party candidate is elevated under Minnesota law to

major-party status if five percent of the electorate votes for that candidate on the ballot line of the minor party and the party gets votes in each county. Minn. Stat. § 200.02, subd. 7(a) (1994). Thus, fusion allows the former minor party to get a preferred place on the general election ballot in the next election for all of its candidates without having to submit nominating petitions. Minn. Stat. § 204D.13 (1994).

However, achieving major-party status in this manner frustrates the State's effort to reserve the printed ballot for parties that secure a minimum level of voter support. A minor party that wins votes by nominating a major-party candidate is not clearly demonstrating a genuine level of voter support. Its separate vote tally may merely reflect the popularity of the major party's candidate and a degree of dissatisfaction with the major party rather than support for the minor party. The State should not be required to use its election machinery on behalf of a party whose credentials as a bona fide major party are so dubious.

The ballot manipulations described above are driven by insubstantial "short-range political goals," *Storer v. Brown*, 415 U.S. 724, 735 (1974), and conflict with the State's compelling interest in assuring fair and honest elections. A fusion ban reasonably prevents these manipulations.

D. A Ballot Fusion Ban Prevents Party Splintering.

A ballot fusion ban also serves the State's compelling interest in avoiding "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer*, 415 U.S. at 736. Major parties usually "have numerous members with a wide variety of interests, . . . features necessary for success in majoritarian elections. Consequently, the influence of any one

person or the importance of any single issue within a political party is significantly diffused." *Colorado Rep. Fed. Campaign Comm. v. F.E.C.*, ___ U.S. ___, 64 U.S.L.W. 4663, 4675, (U.S. June 26, 1996) (Thomas, J., concurring in the judgment and dissenting in part). Thus, "[b]road-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interest that combine to seek national goals." *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting).

Cross-filing invites major-party splintering and factionalism by making it possible for the various separate political interests that coalesce into a political party to make separate voter appeals at the ballot box. Thus, for example, the pro-life, lower tax and fair minimum wage factions of a major party may all separately nominate the same major party candidate under appealing ballot slogans when cross-filing is permitted. This turns the general election ballot into a forum for venting intraparty squabbles by creating competition among the various party interests. Such competition may properly be confined to the primary election. *See Storer*, 415 U.S. at 735 (recognizing legitimacy of state policy to avoid making general election ballot "a forum for continuing intraparty feuds.").

The court of appeals failed to appreciate these dangers, which are similar to those in California's abandoned cross-filing system. The California system allowed a candidate to be nominated more than once by allowing the candidate to enter (and win) more than one party primary. Bernard L. Hyink, et al., *Politics and Government in California* at 75 (12th ed. 1989). The California cross-filing law was repealed in 1959 after being widely criticized for "undermin[ing] party responsibility and cohesiveness." *Id.* at 76. *See also* William R. Kirschner, *Fusion And The*

Associational Rights Of Minor Political Parties, 95 Colum. L. Rev. 683, 719 n.254 (1995) (California cross-filing system reduced distinctions between parties and "electoral competition declined drastically."). The Constitution should not compel Minnesota to repeat California's mistake.

The court of appeals alluded to a situation ripe for splintering when noting that fusion would allow a single-issue minor party, such as the Right To Life Party, to nominate a major-party candidate. Pet. App. 9. The court saw this as a benefit because it gives voters more information about a candidate's views. *Id.* However, there is a countervailing harm associated with promotion of single-issue campaigns. Single-issue ballot campaigns sometimes do not lend themselves to the measured consideration compelled by the nature ot a broad party coalition. One commentator notes that:

> The traditional party roles of weighing competing interests, achieving compromise, and moderating demands in order to appeal to the maximum number of voters are not played in this process [of initiative] because they are not the participants. Single issue groups may include some of these concerns in their campaign strategy, but there is no institutional means to counter their issue perspective, and the propositions are thus typically more extreme than they would be if they were part of a party platform.

David Magleby, *Direct Legislation: Voting On Ballot Propositions In The United States* 189 (1984). *See also* Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. Pitt. L. Rev. 737, 741 (1981) ("Groups that achieve a tenuous coherence through advancing single, narrow ends are little inclined to re-examine the methods proposed. The morality of means does not flourish in an era of single-issue politics.").

In the absence of a fusion ban, opposing single-issue minor parties – like Right To Life and Pro-choice – can cross-nominate opposing major-party candidates. Because major-party candidates generally attract more attention than minor-party candidates, the election is more likely to become a thinly disguised ballot-issue campaign than it would if the two minor parties each nominated their own candidates. The Constitution should not be construed to require the State to foster the growth of single-issue parties, whose campaigns may have drawbacks similar to single-issue ballot elections.[21]

The court of appeals, citing *Norman v. Reed*, 502 U.S. 279 (1992), suggested that factionalism could be avoided merely by requiring consent of the major party and its nominee before a minor party can nominate the candidate of a major party. Pet. App. 7. However, the *Norman* analysis was applied in the context of a severe burden on the right of political association, which required that the challenged law be narrowly tailored to serve its purposes. As demonstrated above, the Minnesota ballot fusion ban has, at most, minimal effect on legitimate associational interests of the New Party, both as compared to the effect of the law challenged in *Norman*, in particular (pp. 29-31, *supra*), and as compared to other cases (pp. 36-40, *supra*)

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[21] Minnesota restricts ballot issue elections. Statewide ballot-issue elections in Minnesota are limited to state constitutional amendments proposed by the legislature. Minn. Stat. § 3.20 (1994). A proposed constitutional amendment authorizing statewide balloting on citizen-proposed issues failed in 1980. David B. Magleby, *"Let The Voters Decide? An Assessment Of The Initiative and Referendum Process,"* 66 U. Colo. L. Rev. 13, 32 (1995). City ballot elections initiated by voters are permitted only in the relatively few home-rule charter cities and then only if specifically authorized by city charter. Minn. Stat. § 410.20 (1994). Only 108 of Minnesota's 854 cities are home-rule cities. 28 Minn. Stat. Ann. at 1-20. (Supp. 1996).

and the core First Amendment values at issue (pp. 18-20, *supra*), in general. Thus, under the balancing test consistently applied by the Court, the State has more leeway than in *Norman* to fashion a reasonable regulation, even if somewhat broader than necessary to accomplish its asserted interests.

Because the effect of the ballot fusion ban on protected interests is minimal and the law serves important, recognized regulatory interests, the Eighth Circuit was wrong in declaring it unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be reversed.

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Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

RICHARD S. SLOWES
Assistant Solicitor General
Counsel of Record

PETER M. ACKERBERG
Assistant Attorney General

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Telephone: (612) 282-5712

Counsel for Petitioners

APPENDIX A

Statutory Compilation

Twelve states in addition to Minnesota directly prohibit fusion in at least some elections: Ga. Code Ann. § 21-2-137 (1993); Ill. Comp. Stat. Ch. 10, § 5/7-12(9) (1994); Ind. Code § 3-10-1-15 (1993); Kan. Stat. Ann. § 25-213 (1993); Ky. Rev. Stat. Ann. § 118.335; La. Rev. Stat. Ann. § 1280.25 (West Supp. 1996); Mo. Rev. Stat. § 115.351 (1994); Neb. Rev. Stat. § 32-612 (1995); Pa. Const. Stat. Ann. § 2870(f) (1994); Tenn. Code Ann. § 2-5-101(f)(1) (Supp. 1995); Tex. Elec. Code Ann. § 162.015 (West Supp. 1996); Wis. Stat. Ann. § 8.15(7) (West 1986 & Supp. 1995). Fusion is effectively prohibited in 20 states and the District of Columbia by a requirement that a candidate be registered in the party from which he or she seeks nomination: Ala. Code §§ 17-16-12, 17-16-14 (1995); Alaska Stat. § 15.25.030(14) (1995); Ariz. Rev. Stat. Ann. § 16-311(A) (1996); Cal. Elec. Code § 8022(a) (West 1989 & Supp. 1996); Colo. Rev. Stat. § 1-4-601 (1980); Fla. Stat. ch. 99.021(1)(b)(1995); Haw. Rev. Stat. § 12-3(a)(7)(1995); Me. Rev. Code Ann. tit. 21-A, § 334 (West 1993); Md. Ann. Code art. 33, § 4A-1(a)(1993); Mass. Gen. L. ch. 53, § 48 (1990); Nev. Rev. Stat. § 293.177 (1991); N.H. Rev. Stat. Ann. § 655:14 (1986 & Supp. 1995); N.J. Stat. Ann. § 19:23-5 (West 1989); N.M. Stat. Ann. §§ 1-8-2, 1-8-3, 1-8-18 (Michie 1995); N.C. Gen. Stat. § 163-106 (1995); Ohio Rev. Code Ann. § 3513.07 (Baldwin 1994); Okla. Stat. tit. 26, § 5-105 (1991); R.I. Gen. Laws § 17-14-1 (1956 & Supp. 1995); W. Va. Code § 3-5-7 (1994); Wyo. Stat. § 22-5-204 (1992); and D.C. Code Ann. § 1-1312(j)(2) (1981 & Supp. 1995).

Four states forbid fusion by permitting a candidate to accept only one nomination: Iowa Code § 49.39 (1995); Mich. Comp. Laws § 168.692 (1989); Mont. Code Ann. § 13-10-303 (1995); and N.D. Cent. Code § 16.1-12-06 (1991). Six states have election laws that could reasonably be construed as a fusion ban: Del. Code Ann. tit. 15, § 3107 (1993); Miss. Code Ann. § 23-15-305 (1990); S.C. Code Ann. 7-11-210 (Law Co-op 1976 & Supp. 1995); Va. Code Ann. § 24.2-525 (Michie 1993); Wash. Rev. Code Ann. § 29.30.095 (West 1995); *Smith v. Ward*, 197 N.W. 684, 684 (S.D. 1924) (construing predecessor statute to S.D. Codified Laws Ann. § 12-6-8 (1995).

Four states permit fusion: N.Y. Elec. Law § 6-120 (McKinney 1978 & Supp. 1996); Or. Rev. Stat. § 248.008(8) (1995); and Vt. Stat. Ann. tit. 17, § 2474 (1982 & Supp. 1994) and Utah Code Ann. § 20A-9-201 (1995).

Election statutes in three states do not prohibit fusion: Ark. Code Ann. § 7-3-107 (Michie 1993) and Conn. Gen. Stat. § 9-451 (1989); *see also Sufphen v. Enking*, 230 P. 38, 39 (Idaho 1924) (nomination of non-party member not prohibited).

APPENDIX B

Act of April 2, 1996, ch. 419, 1996 Minn. Laws 979

Section 1. **PURPOSE**

The purpose of this act is to permit a candidate to appear on the general election ballot as the nominee of more than one political party. This act does not permit the candidate's name to appear on the ballot more than once, because to do so might give the candidate an unfair advantage and might cause some voters to become confused about how to cast their votes, to vote improperly, and to have their votes not counted. This act does not permit the voter to cast a vote for the candidate's party, because the function of an election in the United States is to choose an individual to hold public office, not to choose a political party to control the office and because to do so might likewise cause some voters to become confused.

Sec. 2. Minnesota Statutes 1994, section 200.02, subdivision 7 is amended to read:

Subd. 7: MAJOR POLITICAL PARTY. "Major political party" means a political party that maintains a party organization in the state, political division or precinct in question and:

~~(a) Which~~(1) that has presented at least one candidate for election to a partisan office at the last preceding state general election, ~~which candidate~~ who received votes in each county in that election and received votes from not

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Additions are indicated by underline; deletions by strikeout

less than five percent of the total number of individuals who voted in that election; or

~~(b)~~(2) whose members present to the secretary of state ~~a petititon~~ for a place on the state partisan primary ballot, ~~which~~a petition that contains signatures of a number of the party members equal to at least five percent of the total number of individuals who voted in the preceding state general election.

Votes cast for a candidate who was the nominee of more than one political party in a state general election are not counted in determining whether a minor political party should become a major political party under clause (1).

Sec. 3. Minnesota Statutes 1994, section 200.02, is amended by adding a subdivision to read:

Subd. 22. **MINOR POLITICAL PARTY.** (a) "Minor political party" means a political party that is not a major political party as defined by subdivision 7 and that has adopted a state constitution, designated a state party chair, and met the requirements of paragraph (b) or (c), as applicable.

(b) To be considered a minor party in all elections statewide, the political party must have presented at least one candidate for a partisan office voted on statewide at the preceding state general election who received votes in each county that in the aggregate equal at least one percent of the total number of individuals who voted in the election, or its members must have presented to the

secretary of state a nominating petition in a form prescribed by the secretary of state containing the signatures of party members in a number equal to at least one percent of the total number of individuals who voted in the preceding state general election.

(c) To be considered a minor party in an election in a legislative district, the political party must have presented at least one candidate for a legislative office in that district who received votes from at least ten percent of the total number of individuals who voted for that office, or its members must have presented to the secretary of state a nominating petition in a form prescribed by the secretary of state containing the signatures of party members in a number equal to at least ten percent of the total number of individuals who voted in the preceding state general election for that legislative office.

(d) Votes cast for a candidate who was the nominee of more than one political party in a state general election are not counted in determining whether a minor political party should remain a minor political party under this subdivision.

Sec. 4. Minnesota Statutes 1994, section 204B, subdivision 2, is amended to read:

Subd. 2. CANDIDATES SEEKING NOMINATION BY PRIMARY. No individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nominating petition,

except as otherwise provided for ~~partisan offices in section 204D.10, subdivision 2~~simultaneous nominations in section 5, and for nonpartisan offices in section 204B.13, subdivision 4. A major party candidate who fails to be nominated at the state primary may not be listed on any ballot at the subsequent state general election, except to fill a vacancy as provided in section 204B.13.

Sec. 5. Minnesota Statutes 1994, section 204B.04, is amended by adding a subdivision to read:

Subd. 2a. SIMULTANEOUS NOMINATION. A candidate may seek the nomination of a major political party and one or more minor political parties for the same partisan office simultaneously if the state chair of the parties whose nomination is sought consents in writing to the simultaneous nomination. The forms for written consent of the party chair must be prepared in the manner provided by the secretary of state. A candidate may not be nominated by petition for a partisan office without the written consent of the candidate.

A candidate who seeks the simultaneous nomination of a major political party and one or more minor political parties and fails to be nominated at the state primary for the major political party forfeits the nominations of the minor political parties.

A candidate may not seek the nomination of either a major or minor political party, or both, and file a nominating petition as an independent candidate for the same election.

Sec. 6. Minnesota Statutes 1995 Supplement, section 204B.06, subdivision 1, is amended to read:

Subdivision 1. FORM OF AFFIDAVIT. An affidavit of candidacy shall state the name of the office sought and shall state that the candidate:

(a) is an eligible voter;

(b) has no other affidavit on file as a candidate for any other office at the same primary or next ensuing general election, except that a candidate for soil and water conservation district supervisor in a district not located in whole or in part in Anoka, Hennepin, Ramsey, or Washington county, may also have on file an affidavit of candidacy for mayor or council member of a statutory or home rule charter city of not more than 2,500 population contained in whole or in part in the soil and water conservation district or for town supervisor in a town of not more than 2,500 population contained in whole or in part in the soil and water conservation district; ~~and~~

(c) is, or will be on assuming the office, 21 years of age or more, and will have maintained residence in the district from which the candidate seeks election for 30 days before the general election; and

(d) accepts the nomination, if nominated by petition.

An affidavit of candidacy must include a statement that the candidate's name as written on the affidavit for ballot designation is the candidate's true name or the name by which the candidate is commonly and generally known in the community.

An affidavit of candidacy must include a statement that the candidate's name as written on the affidavit for ballot designation is the candidate's true name or the name by which the candidate is commonly and generally known in the community.

An affidavit of candidacy for partisan office shall also state the name of the candidate's political party or political principle, stated in three words or less.

A candidate seeking the simultaneous nomination of a major political party and one or more minor political parties shall include the consent forms from the party chairs required by section 204B.04, subdivision 2a, with the affidavit of candidacy.

Sec. 7. Minnesota Statutes 1994, section 204D.12, is amended to read:

204D.12 NAMES PLACED ON GENERAL ELECTION BALLOTS

Without payment of an additional fee, the county auditor shall place on the appropriate state general election ballot the name of every candidate:

(a) Whose nomination at the state primary has been certified by the appropriate canvassing board;

(b) Who has been nominated by petition, including candidates certified by the secretary of state; and

(c) Who was nominated and whose name was omitted from the state nonpartisan primary ballot pursuant to

section 204D.07, subdivision 3. Only the names of duly nominated candidates may be placed on a ballot.

A candidate who is nominated for an office by more than one political party may be listed on the ballot only once.

Sec. 8. Minnesota Statutes 1994, section 204D.13 is amended by adding a subdivision to read:

Subd. 4. SIMULTANEOUS NOMINATION. A candidate who is nominated by a major political party and one or more minor political parties shall appear on the ballot in the space designated for the major political party candidate for the office sought. A candidate who is nominated by more than one minor political party but is not the nominee of a major political party shall appear on the ballot in the position designated for the first party filing a nominating petition with the filing officer. The name of each political party nominating the candidate shall appear on the ballot with the candidate's name.

Sec. 9. **REPEALER.**

Minnesota Statutes 1994, section 204D.10, subdivision 2, is repealed.

Sec. 10. **EFFECTIVE DATE.**

This act is effective for the state primary election in 1996 and thereafter.

The amendments made by this act are suspended during any time that the decision of the eighth circuit court of appeals in Twin Cities Area New Party v.

McKenna, No. 94-3417MN, is stayed or the mandate of the court is recalled. If the McKenna decision is reversed, the amendments made by this act expire and the prior law is revived. The purpose of this paragraph is to provide an orderly procedure for complying with the McKenna decision while retaining the prior law prohibiting simultaneous nominations to the extent permitted by the United States Constitution.

Presented to the governor March 30, 1996.

Approved April 2, 1996.

Additions are indicated by underline; deletions by strikeout